No. 14-613

IN THE

Supreme Court of the United States

MARVIN GREEN,

Petitioner,

v.

MEGAN J. BRENNAN, POSTMASTER GENERAL,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR COURT-APPOINTED AMICA CURIAE IN SUPPORT OF THE JUDGMENT BELOW

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QUESTION PRESENTED

Whether the period in 29 C.F.R. § 1614.105(a)(1) for a federal employee to initiate pre-complaint counseling on a constructive-discharge claim under Title VII begins to run when the employee resigns or at the time of the employer's last discriminatory act giving rise to the resignation.

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INTRODUCTION

To exhaust a claim of employment discrimination under Title VII, a federal employee must first consult an equal employment opportunity counselor in his or her agency. This requirement aims to promote early, informal resolution of disputes before the parties' positions have hardened. To that end, employees must satisfy strict time limits for initiating informal counseling. As relevant here, a federal employee must contact a counselor "within 45 days of the date of the matter alleged to be discriminatory." 29 C.F.R. § 1614.105(a)(1).

Marvin Green, a former employee of the U.S. Postal Service, filed suit alleging that he was forced to retire in retaliation for having pursued charges of discrimination. The question presented is whether Green had to initiate informal counseling on that claim within 45 days of his resignation or 45 days of the last discriminatory act of his employer that led to his resignation.

Green and the government would answer that question by applying a general rule that limitations periods often commence when the cause of action accrues. But the principal lesson of this Court's statute-of-limitations cases is simply that the clock starts ticking when the limitations provision says it does. And in a constructive-discharge case, the "matter alleged to be discriminatory" is the underlying discriminatory act of the employer—not the employee's resignation.

The constructive-discharge doctrine protects an employee's access to the full range of remedies for unlawful discrimination when intolerable conditions force him or her to resign; it does not alter the usual structure of a Title VII claim as challenging the discriminatory conduct of the employer. A resignation is "functionally the same as an actual termination in *damages-enhancing respects*," *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 148 (2004) (emphasis added), but nothing in this Court's precedent or the limitations provision supports "the legal fiction that the employee's resignation, or notice of resignation, is a 'discriminatory act' of the employer" for statute-of-limitations purposes, Pet. App. 20a. Moreover, tying the limitations period to the date of resignation, as Green and the government advocate, would frustrate the purpose of the counseling requirement by delaying informal counseling until after the employee's commitment to resign has passed the point of no return.

STATEMENT

A. Legal Background

As amended in 1972, Title VII of the Civil Rights Act of 1964 requires that "[a]ll personnel actions affecting employees or applicants for employment" within certain entities of the federal government "shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a). Although Title VII includes no express anti-retaliation provision applicable to federal employers, courts have construed Title VII's anti-discrimination rule to prohibit retaliation by federal employers against employees or job applicants who oppose practices that Title VII forbids or who pursue charges of discrimination. *See, e.g.*, *Taylor* v. *Solis*, 571 F.3d 1313, 1320 (D.C. Cir. 2009); *see also* 29 C.F.R. § 1614.101(b) ("[n]o person shall be subject to retaliation"); 42 U.S.C. § 2000e-3(a) (private-sector anti-retaliation provision).[1]

Before suing to challenge alleged discrimination, federal employees must first exhaust administrative remedies as provided in 29 C.F.R. part 1614. *See* 42 U.S.C. § 2000e-16(c). Exhaustion procedures in the federal sector are "significantly more onerous" than in the private sector. 1 Friedman, *Litigating Employment Discrimination Cases* § 1:57.8 (rev. Aug. 2012). Whereas private-sector employees exhaust claims by filing a formal charge of discrimination with the Equal

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[1] Before Congress extended Title VII to the federal sector in 1972, discrimination in federal employment was addressed by a series of executive orders going back to the 1940s and, beginning in 1966, administrative regulations then codified at 5 C.F.R. part 713. *See* 80 Fed. Reg. 6,669, 6,669-6,670 (Feb. 6, 2015); EEOC, *Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614*, at P-i to P-iv (rev. Aug. 5, 2015).

Employment Opportunity Commission ("EEOC"), 42 U.S.C. §§ 2000e-5(e), 2000e-16c(b)(1), federal employees must first initiate informal counseling with an equal employment opportunity ("EEO") counselor at the agency accused of discrimination, 29 C.F.R. § 1614.105(a), and then file a formal administrative complaint with the agency before an optional appeal to the EEOC from the agency's final decision. 80 Fed. Reg. 6,669, 6,670 (Feb. 6, 2015). Satisfaction of these "'rigorous administrative exhaustion requirements and [corresponding] time limits'" is a "condition[] [of] the government's waiver of sovereign immunity" in employment-discrimination cases. *McFarland* v. *Henderson*, 307 F.3d 402, 406 (6th Cir. 2002) (quoting *Brown* v. *GSA*, 425 U.S. 820, 833 (1976)); *see also Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 94 (1990) ("§ 2000e-16(c) is a condition to the waiver of sovereign immunity and thus must be strictly construed").

The federal-sector threshold requirement of pre-complaint counseling has no analogue in the private sector. *See* 57 Fed. Reg. 12,634, 12,634-12,635 (Apr. 10, 1992).[2] Pre-complaint counseling "encourag[es] the resolution of employee problems on an informal basis." Exec. Order No. 11478 § 4, 34 Fed. Reg. 12,985, 12,986 (Aug. 12, 1969). The agency's EEO counselor advises the employee of his or her rights and responsibilities, 29 C.F.R. § 1614.105(b)(1), gathers basic information, and "attempts to informally resolve the matter(s)," EEOC, *Equal Employment Opportunity Management*

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[2] Pre-complaint counseling in the federal sector was first required by regulation in 1969, before Title VII was extended to federal employment. 80 Fed. Reg. at 6,670; *see* 34 Fed. Reg. 5,367, 5,369 (Mar. 19, 1969).

Directive for 29 C.F.R. Part 1614, at 2-1 (rev. Aug. 5, 2015) ("EEO-MD-110").

Recognizing that "the earliest possible contact with a counselor aids resolution of disputes because positions on both sides have not yet hardened," 57 Fed. Reg. at 12,634-12,635, the EEOC has established strict time limits for federal employees to initiate pre-complaint counseling. The time limit was originally set at 15 days, *see* 34 Fed. Reg. 5,367, 5,369 (Mar. 19, 2969), and soon extended to 30, *see* 37 Fed. Reg. 22,717, 22,719 (Oct. 21, 1972). In 1989, the EEOC invited comment on whether the time period should be lengthened. 54 Fed. Reg. 45,747, 45,749 (Oct. 31, 1989). Some commenters advocated for a "symmetry between" the federal-sector deadline for contacting a counselor and the private-sector deadline for filing a charge with the EEOC—either 180 or 300 days from the time of the unlawful employment practice, depending on whether the employee initially institutes qualified state proceedings, 42 U.S.C. § 2000e-5(e)(1). *See* 57 Fed. Reg. at 12,634. According to those commenters, "30 days was insufficient to reflect, secure advice or realize the impact of a discriminatory action," and "the relatively short period was screening out many meritorious complaints." *Id.*

The EEOC rejected that proposal, concluding that "the analogy between the private sector filing period and the federal sector counseling time limit" was not "apt" in light of the unique role of pre-complaint counseling in the federal employment context. 57 Fed. Reg. at 12,634. The EEOC therefore set the time limit at 45 days, where it has remained. *Id.* at 12,635. A federal employee alleging employment discrimination must accordingly

> initiate contact with a[n EEO] Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action.

29 C.F.R. § 1614.105(a)(1).

Courts have construed this provision to "function[] like a statute of limitations," under which an employee's failure to contact an EEO counselor within 45 days bars any later suit. *Ramirez* v. *Secretary, Dep't of Transp.*, 686 F.3d 1239, 1243 (11th Cir. 2012); *see* Pet. Br. 4-5; U.S. Br. 16-17; *cf. Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 392-395 (1982) (construing private-sector time limit for filing EEOC charge). The employee's agency or the EEOC "shall" extend this time limit, however, when the employee shows

> that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have been [sic] known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the [EEOC].

29 C.F.R. § 1614.105(a)(2). And this deadline is "subject to waiver, estoppel and equitable tolling." *Id.* § 1614.604(c).

Unless the employee agrees to a longer time, the EEO counselor must complete a final interview within 30 days after the employee initiates pre-complaint counseling. 29 C.F.R. § 1614.105(d). If counseling does

not resolve the matter, the employee may file a formal administrative complaint with the agency accused of discrimination within "15 days of receipt" from the EEO counselor of a written notice of the right to proceed. *Id.* § 1614.106(b). The filing of the administrative complaint triggers the agency's obligation to "conduct an impartial and appropriate investigation ... within 180 days of the filing," unless the parties agree to extend that time. *Id.* § 1614.106(e)(2). Upon completion of the agency's investigation, the employee may "request a hearing and decision from an administrative judge or may request an immediate final decision ... from the agency." *Id.* § 1614.108(f).

At any time while an administrative complaint is pending, the employee may amend it to include "like or related" "issues or claims." 29 C.F.R. § 1614.106(d).[3] The employee need not seek counseling separately on such claims. *See* 29 C.F.R. § 1614.107(a)(2); EEO-MD-110, at 5-10 (citing *Braxton* v. *Potter*, 2010 WL 4388483, at *2 (Office of Fed. Ops. Oct. 29, 2010)); *Gorski* v. *Henderson*, 2000 WL 1687230, at *2 (Office of Fed. Ops. Oct. 31, 2000); EEOC, *Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614*, at 5-9 (rev. Nov. 9, 1999).

If the agency's final decision is adverse to the employee, the employee may file an optional appeal with the EEOC within 30 days after receipt of the agency's

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[3] "A later claim ... is 'like or related' to the original complaint if the later claim ... adds to or clarifies the original complaint and/or could have reasonably been expected to grow out of the original complaint during the investigation." *Complainant* v. *McHugh*, 2014 WL 6853728, at *2 (Office of Fed. Ops. Nov. 25, 2014); *see also* EEO-MD-110, at 5-12 (discussing amendment of complaint to add constructive-discharge claim).

decision. 29 C.F.R. §§ 1614.401(a), 1614.402. Alternatively, the employee may file a civil action within 90 days of receipt of the agency's final decision. 42 U.S.C. § 2000e-16(c); 29 C.F.R. § 1614.407.[4]

On February 6, 2015, the EEOC issued an advance notice of proposed rulemaking "to consider how the Commission's federal sector complaint process currently works and whether wholesale revisions to the process are needed." EEO-MD-110, at P-vii to P-viii; *see* 80 Fed. Reg. at 6,669-6,671. Among other things, the EEOC sought comments on "[h]ow many days ... a complainant [should] have to contact a counselor from the date of the alleged discriminatory matter." 80 Fed. Reg. at 6,671. The comment period ended in April 2015. The EEOC has said it "intends to issue a [notice of proposed rulemaking] to amend the [part] 1614 regulations," EEO-MD-110, at P-viii, but has not yet done so. *See* Regulations.gov, *Federal Sector Equal Employment Opportunity* (last visited Sept. 28, 2015).

B. Green's Claim

Petitioner Marvin Green, an African-American man, was a long-time employee of the U.S. Postal Service. In 2008, while serving as postmaster in Englewood, Colorado, Green applied for a promotion to a higher-level postmaster position in Boulder, Colorado. Pet. App. 3a, 29a. His supervisor, Gregory Christ, se-

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[4] The employee may file suit 180 days after the filing of the administrative complaint if the agency has failed to take final action. 42 U.S.C. § 2000e-16(c); 29 C.F.R. § 1614.407. If the employee appeals to the EEOC, any subsequent lawsuit must be filed within 90 days after receipt of the EEOC's decision, but may be filed 180 days after the filing of the appeal if the EEOC fails to issue a decision. 42 U.S.C. § 2000e-16(c); 29 C.F.R. § 1614.407.

lected someone else for the job. Pet. App. 3a. Believing that he had been denied promotion because of his race, Green contacted a Postal Service EEO counselor in July 2008 and later filed a formal administrative complaint. *Id.*

According to Green, Christ and Charmaine Ehrenshaft, a Postal Service manager of labor relations, began bullying and harassing him while he pursued his administrative complaint. Pet. App. 3a; JA12-14. Green initially sought to address the situation with the help of a representative from the National League of Postmasters. JA12-14. When that did not resolve the matter to Green's satisfaction, Green initiated a second EEO proceeding by contacting the Postal Service EEO counselor in May 2009, alleging that the threats and harassment constituted unlawful retaliation for his 2008 EEO activity. Pet. App. 3a; JA14. Green did not proceed with an administrative complaint at that time.

While Green's second EEO proceeding was pending, Ehrenshaft and her supervisor, David Knight, received a congressional inquiry related to Green's conduct as Englewood postmaster. Pet. App. 30a-31a. The inquiry concerned complaints by the National Letter Carriers' Union that Green had failed to comply with employee grievance procedures and had intentionally delayed mail relating to those grievances. *Id.* Ehrenshaft instructed Green to appear for an investigative interview about the allegations. Pet. App. 30a.

On December 11, 2009, Ehrenshaft and Knight conducted the investigative interview. Pet. App. 4a. Green was represented at the interview by Robert

Podio of the National Association of Postmasters. *Id.*[5] Knight and Ehrenshaft interviewed Green about the alleged mishandling of employee grievances and delay of the mail. *Id.* Knight also asked Green about certain allegations another Postal Service employee had raised concerning Green's conduct. Pet. App. 31a. When that interview ended, two agents from the Postal Service Office of the Inspector General ("OIG") questioned Green further about the allegation that he had intentionally delayed the mail—a potential felony. *Id.*; Pet. App. 4a-5a; JA16-17. After the OIG interview, Knight and Ehrenshaft informed Green that he had been placed on immediate off-duty status under the Postal Service's emergency-placement policy. Pet. App. 5a; C.A. App. 600.

The next day, Podio reached out to Knight to seek a resolution. Pet. App. 5a. Podio proposed that he would try to "get [Green] to retire" if Knight would forgo any charges against him. JA54. Knight agreed, *id.*, and the negotiations proceeded, Pet. App. 32a. On December 15, 2009, Podio forwarded to Green a proposed settlement agreement. *Id.*

The settlement agreement provided that Green would "immediately relinquish" his Englewood postmaster position and would "be assigned and accept placement to" a lower-level position in Wamsutter, Wyoming. JA60; *see also* Pet. App. 5a. Green would continue receiving the salary associated with his Englewood position until March 30, 2010, and would be allowed to take various forms of leave through March 31, 2010. JA60. The agreement further provided that

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[5] Green had also retained an attorney, who did not attend the interview. *See* C.A. App. 383, 783.

Green "agree[d] to retire from the Postal Service no later than March 31, 2010." *Id.* If Green's "retirement from the Postal Service d[id] not occur," Green would "report for duty" in the Wamsutter position on April 1, 2010, and would be paid at the lower salary associated with the new position. JA61. In exchange, the Postal Service "agree[d] that no charges w[ould] be pursued based on the items reviewed during" the December 11 investigative interview. JA60.

On December 16, 2009, Green, Podio, and Knight signed the agreement. JA61. Green submitted retirement papers on February 9, 2010, and his retirement became effective on March 31, 2010. Pet. App. 6a, 32a.

On March 22, 2010, Green—who continued to be represented by counsel, JA66—contacted the Postal Service's EEO office concerning a claim of constructive discharge. Pet. App. 6a.[6] Green alleged that he had been "forced [to] retire[]" in retaliation "for engaging in Title VII protected activity." JA64 (capitalization altered); *see also* JA67. On April 23, 2010, Green filed a formal administrative complaint addressing that issue, alleging that the Postal Service had "forced [him] out of [his] job" in retaliation for filing charges of discrimina-

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[6] Green had separately sought EEO counseling on January 7, 2010, concerning events on or before December 11, 2009, including his removal from the Englewood postmaster position and emergency placement on off-duty status. Pet. App. 6a. That proceeding did not address the December 16, 2009 settlement or Green's forced retirement. Once the EEO counselor had processed that informal complaint, Green filed a formal administrative complaint in February 2010 challenging his removal from the Englewood position, the emergency placement, and four retaliatory actions that allegedly took place in 2009. *Id.* The Postal Service dismissed Green's complaint, and the EEOC affirmed. *Id.*

tion. Ex. A, Att. 20 to Def.'s Mot. for Summ. J., Dkt. No. 90-21 (D. Colo. Nov. 12, 2012).[7]

On August 5, 2010, the Postal Service issued a final decision dismissing Green's complaint. JA22-46. The Postal Service concluded that Green failed to state a claim because he voluntarily accepted the benefits of the December 16, 2009 settlement and chose to retire. JA23-24. In the alternative, the Postal Service found that no discrimination had occurred. Green failed to make a prima facie case of retaliation because "[h]is retirement was ... his own choice and decision," JA35, and there was insufficient temporal proximity between Green's EEO activity and the settlement to raise any inference of retaliation, JA36. Although Green had alleged that he was bullied, harassed, and insulted, he "provided no evidence or testimony to support [those] allegations, no witnesses, and no copies of the emails with which he was allegedly 'bombarded.'" JA38. The Postal Service also found legitimate, nondiscriminatory explanations for Knight and Ehrenshaft's actions, noting that the investigative interview was precipitated by a congressional inquiry and other complaints about Green's conduct and that there was no evidence of pretext. JA40-44. Green did not appeal to the EEOC.

C. Proceedings Below

On September 8, 2010, Green filed this lawsuit. As relevant here, Green's amended complaint alleged that the Postal Service "forc[ed] him to retire" in retaliation for his protected Title VII activity. JA20. Green supported that claim with allegations of "harassment, bul-

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[7] Although Green's complaint made other allegations, Green's counsel clarified that "'the only issue'" presented was "'the constructive discharge claim.'" Pet. App. 6a.

lying, insults, humiliation, and unjustified disciplinary actions" occurring between August 2008 and December 16, 2009. JA12-20. The amended complaint alleged no facts post-dating the December 16, 2009 settlement, except for the signing and effective date of Green's retirement papers and the filing of Green's administrative complaint. JA8-21.

The Postal Service moved for summary judgment on the constructive-discharge claim, arguing among other things that Green had not properly exhausted the claim because he failed to make timely contact with the EEO counselor under 29 C.F.R. § 1614.105(a)(1). C.A. App. 401-404. The Postal Service argued that the 45-day deadline began to run when "the employee ha[d] notice of the discriminatory acts, not the time at which the consequences of the acts became most painful." C.A. App. 402 (internal quotation marks omitted). Because "[e]ach of the retaliatory acts [Green] allege[d] occurred on or before December 16, 2009, when he signed the settlement agreement in which he agreed to retire," the Postal Service argued that Green's constructive-discharge claim "accrued on December 16, 2009, more than 45 days before he contacted the EEO counselor on March 22, 2010." C.A. App. 403-404.

The district court granted the Postal Service's motion and dismissed the constructive-discharge claim. Pet. App. 28a. The court agreed with the Postal Service that the 45-day time limit on a constructive-discharge claim began to run at the time of the employer's discriminatory act, just as in other discrimination claims. Pet. App. 36a-37a. Because "[t]here [wa]s no dispute" that all of the allegedly retaliatory acts in this case "occurred on or before December 16, 2009"—and because Green "d[id] not argue waiver, estoppel, or equitable tolling" or contend that he lacked notice of the

alleged discriminatory acts—Green's EEO contact on March 22, 2010 was too late. Pet. App. 37a-38a.

The U.S. Court of Appeals for the Tenth Circuit affirmed in relevant part. Pet. App. 15a-23a. The court held that "the start of the limitations period for constructive-discharge claims is the same as for other claims of discrimination," running from the last alleged discriminatory act of the employer. Pet. App. 16a. The court explained that the chief function of the constructive-discharge doctrine is to expand the remedies available to an employee who reasonably resigns because of intolerable working conditions. Pet. App. 16a-17a, 21a. While "'a constructive discharge is functionally the same as an actual termination in *damages-enhancing respects*,'" the court reasoned, "[i]t does not follow ... that it should be treated as the functional equivalent for purposes of the limitations period." Pet. App. 21a. The court "c[ould] not endorse the legal fiction that the employee's resignation, or notice of resignation, is a 'discriminatory act' of the employer," particularly where doing so would "allow[] the employee to extend the date of accrual indefinitely." Pet. App. 20a, 21a.

SUMMARY OF ARGUMENT

A federal employee must initiate pre-complaint counseling on a constructive-discharge claim within 45 days after the employer's last discriminatory act giving rise to the employee's resignation. Green's EEO contact, some three months after the last alleged act of discrimination, was too late.

I. A constructive-discharge claim entails both predicate discrimination by the employer that is independently actionable and working conditions "so intolerable that a reasonable person would have felt com-

pelled to resign." *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 147 (2004). The intolerable conditions make the employee's decision to resign reasonable, thereby preserving remedies that otherwise would be unavailable to an employee who quits his job. *See id.* at 148 (resignation is "functionally the same as an actual termination in damages-enhancing respects"). But it is the employer's predicate discrimination that is the target of the employee's claim—the "matter alleged to be discriminatory"—without which the claim fails. The regulation's requirement that the employee initiate pre-complaint counseling within 45 days of the "matter alleged to be discriminatory" is thus tethered to the employer's discriminatory conduct—not the employee's decision to resign.

The last-discriminatory-act rule accords with this Court's precedent applying limitations periods in other discrimination cases. The "'proper focus'" in such cases "'is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful.'" *E.g.*, *Delaware State Coll.* v. *Ricks*, 449 U.S. 250, 258 (1980). In a constructive-discharge case, the employee's resignation is a consequence of the employer's discriminatory conduct, and the proper focus is therefore on the underlying discriminatory acts.

II. Green and the government contend that this straightforward approach clashes with a "general rule" that limitations periods start running when a claim accrues. "[S]tatutes of limitations," however, "do not inexorably commence upon accrual." *Heimeshoff* v. *Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604, 610 (2013). When they do not, courts apply them according to their text—even when that means the limitations period starts before the cause of action accrues. To determine when the limitations period in 29 C.F.R.

§ 1614.105(a)(1) begins to run in this case, the Court must therefore identify the "matter" that Green "alleg[s] to be discriminatory"—not the moment when he had a complete and present cause of action.

III. The last-discriminatory-act rule promotes informal conciliation—a paramount objective of Title VII and the very purpose of the regulation at issue here—by requiring that an employee initiate counseling promptly, when informal resolution may still be possible. Far from "straining" workplace relationships, as Green predicts, the last-discriminatory-act rule encourages resolution of claims before those relationships have been severed. Delaying counseling until after an employee has resigned, as Green and the government advocate, would frustrate that goal.

Although Green contends that the date-of-resignation rule is easier to apply, his dispute with the government over how to apply that rule in this case suggests otherwise. In any event, applying the last-discriminatory-act rule in a constructive-discharge case requires courts to make precisely the same determinations they routinely make in assessing the timeliness of other kinds of discrimination claims. Green offers no reason to think that those inquiries will be more burdensome in this context.

Nor does the last-discriminatory-act rule work any unfairness to diligent claimants. Safety valves in the regulation require extension of the deadline or application of equitable doctrines in cases where the employee lacked notice of the deadlines, where the employer lulled the employee into delaying too long, or where other circumstances warrant relief from the limitations provision. Outside of those circumstances, however, the regulation intentionally demands compliance with

rigorous time limitations to maximize the chance of early, informal resolution. Green failed to comply with those requirements.

ARGUMENT

I. THE LIMITATIONS PERIOD FOR INITIATING PRE-COMPLAINT COUNSELING ON A CONSTRUCTIVE-DISCHARGE CLAIM BEGINS AT THE TIME OF THE EMPLOYER'S LAST DISCRIMINATORY ACT

A. In A Constructive-Discharge Claim, The "Matter Alleged To Be Discriminatory" Is The Discriminatory Conduct Of The Employer Giving Rise To The Resignation

Under 29 C.F.R. § 1614.105(a)(1), as relevant here, the 45-day deadline for a federal employee to initiate pre-complaint counseling on a charge of discrimination begins to run on "the date of the matter alleged to be discriminatory." The court of appeals correctly held that the "matter alleged to be discriminatory" in a constructive-discharge claim is not the employee's decision to resign, but the underlying discriminatory act of the employer that led to the resignation.

As the court of appeals explained, the constructive-discharge doctrine serves to "expand the remedies available to an employee subjected to improper employer conduct." Pet. App. 16a. Under Title VII, courts that find unlawful discrimination may award damages and equitable remedies. 42 U.S.C. § 2000e-5(g)(1); *see Pollard* v. *E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 848-853 (2001); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1975). Certain remedies, however—including back pay, front pay, and reinstatement—are generally available only if the employee was discharged. *See, e.g., Jurgens* v. *EEOC*, 903

F.2d 386, 389 (5th Cir. 1990); *Major* v. *Rosenberg*, 877 F.2d 694, 695 (8th Cir. 1989); Pet. App. 16a; *see also* 3 Larson, *Labor & Employment Law* § 59.05[8] (2015) ("whether a plaintiff quit voluntarily or was constructively discharged will determine whether he or she will be entitled to back pay and perhaps other remedies" (footnote omitted)). Employees have a duty to mitigate damages, and "remaining on the job" is usually encompassed within that duty. *Jurgens*, 903 F.2d at 389. "[A]n employee who quits a job after employer misconduct" is therefore ordinarily "treated as having voluntarily left the employment" and forfeits his right to those remedies. Pet. App. 16a.

The constructive-discharge doctrine recognizes that, in some cases, "unendurable working conditions" might make it reasonable for an employee to resign, and that employers should not be able to evade liability for otherwise available remedies for unlawful discrimination by forcing such a resignation. *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 141 (2004). When that occurs, the employee's reasonable decision to resign is "assimilated to a formal discharge for *remedial purposes*." *Id.* (emphasis added). As a result, the employee may resign without forfeiting the opportunity to seek back pay and front pay or reinstatement. *Id.* at 147 n.8; *see* Pet. App. 16a-17a, 21a; 1 Lindemann et al., *Employment Discrimination Law* 21-49 (5th ed. 2012) ("An employee confronted with an unsatisfactory or even discriminatory job environment is not precluded from quitting and suing for whatever legal violation may have occurred. Unless the constructive discharge test is met, however, a court cannot hold the employer responsible for the economic losses that the employee brought about by quitting.").

Although the constructive-discharge doctrine protects an employee's access to the full range of remedies when intolerable conditions force him or her to resign, it does not alter the usual anatomy of a Title VII claim as a challenge to the discriminatory conduct of the employer. To prevail on a constructive-discharge claim, the employee must show both predicate discrimination that is independently actionable and working conditions "so intolerable that a reasonable person would have felt compelled to resign." *Suders*, 542 U.S. at 147-148. The latter factor makes the employee's decision to resign reasonable, thereby preserving the full range of remedial options. *Id.* at 141. But it is the former factor—predicate discrimination by the employer—that is the target of the claim. The underlying discriminatory practice can be a discrete act (*e.g.*, a demotion or transfer) or a hostile work environment. *Id.* at 148. But "if the underlying discrimination claim fails, the constructive discharge claim necessarily fails as well." 1 Lindemann et al., *Employment Discrimination Law* 21-49; *see also, e.g.*, *O'Brien* v. *USDA*, 532 F.3d 805, 811 (8th Cir. 2008); *Bannon* v. *University of Chi.*, 503 F.3d 623, 629-630 (7th Cir. 2007); *Wells* v. *Shalala*, 228 F.3d 1137, 1146 (10th Cir. 2000); *Hernandez-Torres* v. *Intercontinental Trading, Inc.*, 158 F.3d 43, 47-48 (1st Cir. 1998); Shuck, *That's It, I Quit: Returning to First Principles in Constructive Discharge Doctrine*, 23 Berkeley J. Emp. & Lab. Law 401, 416 (2002) ("constructive discharge claim cannot exist independently of a discrimination claim").

Contrary to the government's suggestion (at 24), this Court recognized in *Suders* that an employee's resignation in a constructive-discharge case is not imputed to the employer for all purposes:

> Unlike an actual termination, which is *always* effected through an official act of the company, a constructive discharge need not be. A constructive discharge involves both an employee's decision to leave and precipitating conduct: *The former involves no official action*; the latter, like a harassment claim without any constructive discharge assertion, may or may not involve official action.

542 U.S. at 148 (second emphasis added). The Court treated resignation as "functionally the same as an actual termination" only "in damages-enhancing respects." *Id.* The Tenth Circuit therefore correctly refused to "endorse the legal fiction that the employee's resignation, or notice of resignation, is a 'discriminatory act' of the employer" for statute-of-limitations purposes. Pet. App. 20a.

In some cases, of course, the time of the employee's reasonable resignation might coincide with the time of the employer's discriminatory conduct. That might occur when the intolerable conditions precipitating an employee's decision to resign are themselves alleged discriminatory acts of the employer. In *Suders*, for example, the plaintiff was subjected to "a continuous barrage of sexual harassment that ceased only when she resigned" on the heels of a final act of harassment. 542 U.S. at 135, 136. But where an employee is subject to an allegedly discriminatory act, such as a transfer or demotion, and resigns later due to consequent intolerable circumstances that are not themselves alleged to be discriminatory—*e.g.*, if the employee's new position is in a bad location, entails longer hours, or requires menial work beneath the employee's skill set—there is a clear distinction between the employee's resignation and the underlying unlawful act of discrimination. Only

the latter "involves ... official action," *id.* at 148, and only the latter constitutes the "matter alleged to be discriminatory," 29 C.F.R. § 1614.105(a)(1). This is such a case. Green's amended complaint alleged no discriminatory conduct or events after he received and signed the settlement agreement. *Supra* pp. 12-13. Yet he waited more than three months to approach an EEO counselor about the actions Knight and Ehrenshaft took in forcing him to retire.

B. The Last-Discriminatory-Act Rule Accords With This Court's Precedent

The last-discriminatory-act rule and its application in this case conform to the approach this Court has taken in applying limitations periods in other discrimination cases. That precedent establishes that "'[t]he proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful.'" *Delaware State Coll.* v. *Ricks*, 449 U.S. 250, 258 (1980). Consistent with that approach, applying the limitations period in 29 C.F.R. § 1614.105(a)(1) should focus on the employer's discriminatory acts, not on the employee's decision to resign as a consequence of those acts.

In *Ricks*, the plaintiff, a college professor, was denied tenure. In line with the college's standard procedure, Ricks was offered a one-year terminal contract, which he accepted. 449 U.S. at 252-254. More than 180 days later, Ricks filed a charge of discrimination with the EEOC claiming that he was denied tenure based on his national origin, and he later filed suit. *Id.* at 254. The court of appeals held that Ricks's EEOC complaint was timely under the private-sector limitations provision, 42 U.S.C. § 2000e-5(e), because the limitations pe-

riod did not begin to run until his terminal contract expired. *Id.* at 255.

This Court reversed. Under the limitations provision, Ricks was required to file a charge with the EEOC "'within [180] days after the alleged unlawful employment practice occurred.'" *Ricks*, 449 U.S. at 256 (quoting 42 U.S.C. § 2000e-5(e)). Applying that provision "require[d] [the Court] to identify precisely the 'unlawful employment practice' of which [Ricks] complain[ed]." *Id.* at 257. Based on the allegations of the complaint, the Court concluded that "the only alleged discrimination occurred—and the filing limitations period[] therefore commenced—at the time the tenure decision was made and communicated to Ricks." *Id.* at 258. That was so "even though one of the *effects* of the denial of tenure—the eventual loss of a teaching position—did not occur until later." *Id.* The Court rejected Ricks's argument that the limitations period ran from his last date of employment, concluding: "If Ricks intended to complain of a discriminatory discharge, he should have identified the alleged discriminatory acts that continued until, or occurred at the time of, the actual termination of his employment. But the complaint alleges no such facts." *Id.* at 257.

Similarly, in this case, the only discrimination alleged in Green's amended complaint occurred when (or before) he received and signed the settlement agreement. *Supra* pp. 12-13. Green alleged no "discriminatory acts that continued until, or occurred at the time of, the actual termination of his employment." *Ricks*, 449 U.S. at 257. His eventual resignation was an effect of the December 16, 2009 settlement, but the fact that it occurred later does not change when the alleged discriminatory event occurred.

The government claims that an employee's resignation in the constructive-discharge context "is not 'a delayed, but inevitable, consequence' of the challenged conduct, ... but rather a new, intervening act which is imputed to the employer." U.S. Br. 12 (quoting *Ricks*, 449 U.S. at 257-258); *see also* U.S. Br. 25-26. Given the government's own argument (at 32-34) that Green agreed to retire at the time of settlement, leaving no further decision to make, this contention provides no basis to distinguish *Ricks* from the facts of this case. In any event, as discussed, *supra* pp. 17-21, the employee's decision to resign in a constructive-discharge case "involves no official action," *Suders*, 542 U.S. at 148, and is "assimilated to a formal discharge" by the employer "for remedial purposes," *id.* at 141. And, contrary to the government's and Green's suggestion, *see* U.S. Br. 25-26; Pet. Br. 25, the Court's holding in *Ricks* did not hinge on the "inevitab[ility]" of the plaintiff's eventual termination, but on the fact that the "only challenged employment practice" was the employer's tenure decision, which "occur[red] before the termination date," 449 U.S. at 259. As the Court confirmed, "[i]t [wa]s simply insufficient for Ricks to allege that his termination 'g[ave] present effect to the past illegal act'"; the "emphasis is not upon the effects of earlier employment decisions"—whether inevitable or not—but on "'whether any present *violation* exists.'" *Id.* at 258.

That reading of *Ricks* is confirmed by the Court's decision one year later in *Chardon* v. *Fernandez*, 454 U.S. 6 (1981) (per curiam). *Chardon* addressed the claims of school administrators who challenged their terminations on First Amendment grounds. The plaintiffs received notices on certain dates of their future terminations and brought suit more than one year after receiving the notices. 454 U.S. at 6-7. The Court held

their claims barred by the one-year statute of limitations applicable to 42 U.S.C. § 1983, concluding that the limitations period commenced at the time of the challenged decision of the employer, not the effective date of the terminations. *Id.* at 8. As in *Ricks*, the plaintiffs "allege[d] that the decision to terminate was made" for unlawful reasons. *Id.* And, as in *Ricks*, "[t]here were no other allegations ... of illegal acts subsequent to the date on which the decision[] to terminate w[as] made." *Id.* The "'[m]ere continuity'" of the plaintiffs' employment was "'insufficient to prolong the life of a cause of action for employment discrimination.'" *Id.* (quoting *Ricks*, 449 U.S. at 257).

Ricks in turn relied on *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 557-558 (1977), which similarly focused on the alleged unlawful conduct of the employer. The plaintiff in *Evans* was a flight attendant who had been forced to resign under a discriminatory policy that the airline subsequently abandoned. *Id.* at 554-555. The plaintiff did not challenge that policy at the time, and was later rehired. Under the airline's seniority system, she received no credit for her prior service. *Id.* at 555. The plaintiff sued for backpay and retroactive seniority, but the Court held that her claim was properly dismissed. *Id.* at 556-557. Although "the seniority system g[ave] present effect to a past act of discrimination," the "critical question" was whether "any present *violation* exist[ed]," and the plaintiff "ha[d] not alleged" any discrimination by the airline in administering the seniority system. *Id.* at 558. As the Court later explained in applying the private-sector EEOC deadline, "[t]he instruction provided by [this precedent] is clear": the period for filing a charge of discrimination begins when the alleged "unlawful practice takes place," not upon "the occurrence of subsequent nondiscriminatory

acts that entail adverse effects resulting from the past discrimination." *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U.S. 618, 628 (2007), *superseded by statute on other grounds*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5; *see also id.* at 621 ("the time for filing a charge of employment discrimination ... begins when the discriminatory act occurs"). The claims in *Evans* and *Ricks* were barred because "[i]n each case, the employee filed charges well after the discrete discriminatory act occurred"; "[n]o repetitive, cumulative discriminatory employment practice was at issue in either case." *Ledbetter*, 550 U.S. at 651-652 (Ginsburg, J., dissenting).[8]

These decisions confirm that in a constructive-discharge case, the "'proper focus'" in applying the limitations period in 29 C.F.R. § 1614.105(a)(1) should similarly be "'upon the time of the *discriminatory acts*,'" not upon the time when the employee feels the conse-

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[8] Ignoring the Court's actual holding in *Evans*, the government reads that decision to imply that if the plaintiff there had challenged her initial separation, the time limit for such a challenge would have run from the effective date of the separation. U.S. Br. 26-27. That issue was not before the Court. *Cf. Central Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 363 (2006) (disregarding dicta in prior case "in which the point now at issue was not fully debated"). In any event, in *Evans*, the time of the plaintiff's original resignation coincided with the time of the unlawful employment practice, which was the application to the plaintiff of a discriminatory policy requiring her to resign immediately upon her marriage. *See* 431 U.S. at 554-555. The Court's observation that any charge would have had to be filed with the EEOC "within 90 days of her separation" would therefore have been true regardless of whether the limitations period ran from the time of the employee's resignation or from the time of the employer's discriminatory conduct.

quences of those acts, *Ricks*, 449 U.S. at 258.[9] Suppose, for example, an employee were transferred to a less desirable position because of her gender. If she later found her new position intolerable and resigned—but did not allege that any discriminatory acts occurred after her transfer and did not allege that the intolerable conditions were themselves discriminatory—then her resignation would simply "give[] present effect to [the]

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[9] The EEOC has equated the operation of the federal-sector provision with the operation of the private-sector provision at issue in *Ricks* and similar cases. EEOC, *Compliance Manual: Threshold Issues* § 2-IV(C)(1), *available at* http://www.eeoc.gov/policy/docs/threshold.html (last visited Sept. 28, 2015).

In *Bailey* v. *United Airlines, Inc.*, 279 F.3d 194 (3d Cir. 2002), the EEOC argued in an amicus brief that the 180-day private-sector filing period began to run in that case on the date the employee rejected an option to resign and was consequently terminated, not on the earlier date when the employer presented that option. EEOC Amicus Br., *Bailey*, 2001 WL 34105245, at *6-15 (3d Cir. Mar. 26, 2001). In support of that argument, the EEOC analogized to the constructive-discharge context, citing cases holding that "the limitations period on a claim of constructive discharge begins to run when the employee 'effectively communicate[s] her intention to resign.'" *Id.* at *9. Green—but not the government—asserts (at 25-26) that the EEOC's statement in the *Bailey* brief is entitled to respect under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). *Cf.* U.S. Br. 31. But *Bailey* involved a termination, not a constructive discharge, and did not present any question concerning the last-discriminatory-act rule. The statement in the *Bailey* brief addressing constructive discharge cannot be treated as reflecting the EEOC's considered views on the question presented here—particularly given the conflict between the EEOC's statement there and its other repeated statements that the federal- and private-sector filing periods begin to run at the time of the unlawful event or practice, *see, e.g.*, EEOC, *Compliance Manual: Threshold Issues* § 2-IV(C)(1); 57 Fed. Reg. 12,634, 12,634-12,635 (Apr. 10, 1992). *See Skidmore*, 323 U.S. at 140 (weight accorded agency position "depend[s] upon ... its consistency with earlier and later pronouncements").

past act of discrimination." *Evans*, 431 U.S. at 558. In such circumstances, where "the only challenged employment practice occur[red] before" the resignation date, the limitations period on any constructive-discharge claim would "necessarily commence to run before that date." *Ricks*, 449 U.S. at 259. Similarly, in Green's constructive-discharge claim, the discriminatory acts are those of the Postal Service precipitating his resignation, which occurred long before Green sought EEO counseling. Green's act of resignation itself was only a consequence of those illegal acts. Pet. App. 20a.

Relying on *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101 (2002), Green contends (at 26) that where a claim is "'composed of a series of separate acts,'" the "most recent event 'contributing to the claim' triggers the filing period." But *Morgan*, too, focused on the unlawful conduct of the employer. In *Morgan*, the Court applied Title VII's limitations period for private-sector claims, which runs from the time the "'unlawful employment practice occurred.'" 536 U.S. at 109 (quoting 42 U.S.C. § 2000e-5(e)(1); emphasis omitted). "The critical questions" were "[w]hat constitutes an 'unlawful employment practice' and when has that practice 'occurred'?" *Id.* at 110. The Court held that where a claim challenges a discrete discriminatory act, the limitations period runs from the date of that challenged act of the employer. *Id.* at 110-115. And where a claim challenges a discriminatory hostile work environment, at least one discriminatory act of the employer must occur within the filing period. *Id.* at 115-121. The Court did not hold that the employee's own act, or the

later consequences of the employer's discriminatory act, could trigger the filing period. *Id.* at 105.[10]

Here, the last alleged discriminatory act giving rise to Green's resignation was the December 16, 2009 settlement. Green did not initiate pre-complaint counseling on a constructive-discharge claim until March 22, 2010—more than three months later. Pet. App. 23a, 37a-38a. Green has not claimed that waiver, estoppel, or equitable tolling apply. Pet. App. 38a. Nor has he asserted that he lacked notice of the Postal Service's alleged discriminatory conduct or that he was otherwise entitled to an extension of the deadline. *Id.*; *see* 29 C.F.R. § 1614.105(a)(2).[11] Green's claim is barred.

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[10] *Morgan* also disposes of Green's contention that the words "matter alleged" in 29 C.F.R. § 1614.105(a)(1) somehow expand the trigger of the limitations period to include anything relating to the "'subject under consideration,'" Pet. Br. 17-18. Like Green's reading of "matter," the plaintiff in *Morgan* argued that the word "practice" in the private-sector limitations provision "connote[d] an ongoing violation that can endure or recur over a period of time." 536 U.S. at 110. But the Court held that discrete discriminatory acts of the employer occurring outside the filing period were not actionable, even if connected to other acts within the period. *Id.* at 110-113. The word "'practice'" did not "convert[] related discrete acts into a single unlawful practice for the purposes of timely filing." *Id.* at 111. The same is true with respect to the word "matter." *See, e.g.*, EEOC, *Compliance Manual: Threshold Issues* § 2-IV(C)(1) n.179 (EEOC equating "matter alleged to be discriminatory" with "the alleged discriminatory employment practice"); 57 Fed. Reg. at 12,635 (interpreting § 1614.105(a)(1) to refer to "the discriminatory event").

[11] Green also has not relied on the second prong of § 1614.105(a)(1), under which the 45-day period for initiating pre-complaint counseling "in the case of personnel action" runs from "the effective date of the action." The EEOC has taken inconsistent positions regarding the role of that provision in a constructive-discharge claim. *Compare, e.g.*, U.S. Br. 38 n.19 (citing EEOC

II. THE LAST-DISCRIMINATORY-ACT RULE IS CONSISTENT WITH STATUTE-OF-LIMITATIONS PRINCIPLES

Lacking support in constructive-discharge doctrine or this Court's Title VII precedent, Green and the government rely primarily on a "general rule" that limitations periods begin to run when a plaintiff has a "'complete and present cause of action.'" Pet. Br. 14-16 (quoting *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 545 U.S. 409, 418 (2005)); U.S. Br. 15-18. In fact, this Court's statute-of-limitations cases make clear that limitations periods commence at the time stated in the relevant textual provision—here, the date of the "matter alleged to be discriminatory," 29 C.F.R. § 1614.105(a)(1). No case supports substituting any default rule in place of the time referenced in the text.

In some statutes of limitations, the relevant text provides that the time period "begin[s] when the[] associated causes of action accrue." *Heimeshoff* v. *Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604, 610 (2013). When applying limitations periods of that form, this Court "ordinarily" construes the reference to "accrual"

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decisions analyzing constructive-discharge claims as "personnel actions"), *with, e.g.*, *Zayas* v. *Shinseki*, 2012 WL 258370, at *1-2 (Office of Fed. Ops. Jan. 20, 2012) (examining "constructive discharge" under "matter alleged to be discriminatory" prong), *and Cabello* v. *Casellas*, 1996 WL 159158, at *3 (Office of Fed. Ops. Mar. 28, 1996) (same). As the court of appeals explained, however, that prong "must refer to the acts of the employer, not the employee." Pet. App. 20a n.3. Here, for example, even if a "personnel action" occurred in February or March 2010 upon the signing or effective date of Green's resignation, those events are not the subject of Green's claim. Green challenges acts of the Postal Service—whether "personnel actions" or not—that occurred on and before December 16, 2009. *See* Pet. App. 23a, 37a-38a; JA8-20.

to mean the time when the plaintiff has a complete and present cause of action on which he can file suit and obtain relief. *Bay Area Laundry & Dry Cleaning Pension Trust Fund* v. *Ferbar Corp. of Cal., Inc.*, 522 U.S. 192, 195, 201 (1997); *see also Heimeshoff*, 134 S. Ct. at 610; *Rawlings* v. *Ray*, 312 U.S. 96, 98 (1941) ("The words 'after the cause of action shall accrue' ... refer to 'a complete and present cause of action.'"); *TRW Inc.* v. *Andrews*, 534 U.S. 19, 36-37 (2001) (Scalia, J., concurring in the judgment) (statute running from date the "'cause of action arose'" should be read in light of background rule that limitations periods "begin[] to run at the time the plaintiff 'has the right to apply to the court for relief'"); *Clark* v. *Iowa City*, 87 U.S. (20 Wall.) 583, 589 (1875) (applying general rule to interpret statute requiring suit within ten years "after the[] cause[] accrue[d]" (applying Iowa Code § 2740.4 (1872)); 1 Corman, *Limitations of Actions* § 6.1 (1991) ("Frequently, legislation stating that commencement occurs when the plaintiff's cause of action accrues is interpreted by courts to mean that moment when the plaintiff has a complete and present cause of action.").

That general rule, however, is only a "default." *Graham County*, 545 U.S. at 418. "[S]tatutes of limitations do not inexorably commence upon accrual," *Heimeshoff*, 134 S. Ct. at 610, and when they do not, courts apply them according to their text—even when the textually prescribed limitations period begins to run before the cause of action accrues. In *Dodd* v. *United States*, 545 U.S. 353 (2005), for example, the Court gave effect to the one-year limitations provision in the federal habeas statute, which ties the start of the filing period not to the accrual of a cause of action, but to specified points in time including the date a new rule of constitutional law is recognized. *Id.* at 357-360. Alt-

hough applying the provision according to its terms would bar many prisoners from challenging their sentences based on a new rule of constitutional law, *id.* at 359-360, the Court concluded that it was "not free to rewrite the statute that Congress ha[d] enacted," *id.* at 359; *see also id.* ("'[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'").

Similarly, in *Pillsbury* v. *United Engineering Co.*, 342 U.S. 197 (1952), this Court considered the Longshoremen's and Harbor Workers' Compensation Act, which provided that "'[t]he right to compensation for disability ... shall be barred unless a claim therefor is filed within one year after the injury.'" *Id.* at 197. The Court held that the one-year period began at the time of injury, not when the employee later became disabled as a result of the injury, concluding that "Congress meant what it said when it limited recovery to one year from date of injury, and 'injury' does not mean 'disability.'" *Id.* at 198-200. Although this interpretation meant that "an employee [could] be barred from filing his claim before his right to file it arises," the Court refused to "rewrite the statute of limitations" to avoid that result. *Id.* at 199-200. And in *McMahon* v. *United States*, 342 U.S. 25 (1951), the Court held that a two-year statute of limitations governing claims by seamen employed by the United States began to run on "the date of injury," even though a plaintiff could not sue until after his claim was administratively disallowed—a process that could take more than a year to complete. *Id.* at 26-27; *see also Heimeshoff*, 134 S. Ct. at 610-611 (enforcing contractual limitations provision that began to run at the time proof of loss was due, rather than at the later time the cause of action accrued).

This Court's Title VII cases follow the same approach. In *Ricks*, the relevant inquiry in applying Title VII's private-sector filing deadline was the one specified by the statute: the Court focused on identifying the "'unlawful employment practice' of which [the plaintiff] complains," not the time when the plaintiff had a complete and present cause of action. 449 U.S. at 257-258 (quoting 42 U.S.C. § 2000e-5(e)); *supra* pp. 21-23. Similarly, in *Morgan*, the "critical questions" were "[w]hat constitutes an 'unlawful employment practice' and when has that practice 'occurred?'" 536 U.S. at 110. The Court did not ask when the plaintiff had a complete and present cause of action.

To determine when the limitations period in 29 C.F.R. § 1614.105(a)(1) begins to run in this case, the Court must similarly identify the "matter" that Green "allege[s] to be discriminatory"—not the moment when he had a complete and present cause of action. And as discussed, *supra* pp. 17-21, in a constructive-discharge case, as in other Title VII contexts, the "matter alleged to be discriminatory" is the discriminatory conduct of the employer, not the employee's resignation.

Green notes that when "the text creating a filing period is unclear," the Court "defer[s] to the general rule" that statutes of limitations ordinarily begin to run upon accrual of the cause of action. Pet. Br. 16; *see also* U.S. Br. 20. But courts apply that default rule "to resolve ... ambiguity, not to create it in the first instance." *Graham County*, 545 U.S. at 419 n.2; *see, e.g.*, *id.* at 417-418 (construing limitations provision in light of default rule where provision's "literal text ... [wa]s ambiguous" and other textual clues supported that reading). Where, as here, the text of the limitations provision dictates that the filing period begins to run at a time other than the "accrual" of a cause of action, the

"default" rule does not override that text. *Id.* at 418; *see also Dodd*, 545 U.S. at 360 (refusing to apply default rule where "there is no such ambiguity" in the statute); *Gabelli* v. *SEC*, 133 S. Ct. 1216, 1224 (2013) (default accrual rule does not apply where text reflects a contrary mandate); *Bay Area Laundry*, 522 U.S. at 201 (default accrual rule does not apply where "Congress has told us otherwise in the legislation at issue").

Moreover, even if the meaning of 29 C.F.R. § 1614.105(a)(1) were unclear in the context of the constructive-discharge doctrine and this Court's precedent—which, as discussed, it is not—any ambiguity must be resolved in favor of a more stringent limitations period, not in favor of the employee. In the context of Title VII litigation by federal employees, "administrative exhaustion 'is a condition to the waiver of sovereign immunity,'" and therefore "'must be strictly construed.'" *Farris* v. *Shinseki*, 660 F.3d 557, 563 (1st Cir. 2011) (quoting *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 94 (1990)); *see McFarland* v. *Henderson*, 307 F.3d 402, 406 (6th Cir. 2002) (in Title VII, "Congress conditioned the government's waiver of sovereign immunity upon a plaintiff's satisfaction of 'rigorous administrative exhaustion requirements and time limitations'" (quoting *Brown* v. *GSA*, 425 U.S. 820, 833 (1976))). "[S]tatutes which waive immunity of the United States from suit are to be construed strictly in favor of the sovereign." *McMahon*, 342 U.S. at 27. In *McMahon*, the Court applied that principle to reject the default accrual rule because the Court "c[ould] not construe the Act as giving claimants an option as to when they will choose to start the period of limitation of an action against the United States." *Id.*; *cf. United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979). As the court of appeals recognized in this case, "[i]t is not [the]

office" of the courts "to expand the time limits beyond what the EEOC has set." Pet. App. 22a.

Green's reliance on *Mac's Shell Service Inc.* v. *Shell Oil Products Co.*, 559 U.S. 175 (2010), is misplaced. To the extent that decision bears any relevance, it only confirms that courts apply statutes of limitations according to their text. The issue before the Court in *Mac's Shell* was not one of timeliness, but whether a franchisee that had not abandoned its franchise could recover for constructive termination under the Petroleum Marketing Practices Act ("PMPA"). *Id.* at 177-178. Green emphasizes (at 21-23) the Court's discussion of the PMPA's statute of limitations, which ran from "the later of" "'the date of termination of the franchise'" or "'the date the franchisor fails to comply'" with PMPA requirements. *Mac's Shell*, 559 U.S. at 189 (quoting 15 U.S.C. § 2805(a)). But the Court cited that language only to support its holding that no cause of action for constructive discharge could lie under the PMPA unless the franchise relationship had terminated. *Id.* at 189-190. And the fact that the PMPA's limitations period ran in some cases from the time of termination, as Green underscores, simply reflected Congress's choice to tie the statute of limitations to "the later of" "the date of termination" or the date of the violation. The EEOC chose different language here.

Green also cites (at 31-32) state-law constructive-discharge cases, but there is no indication in 29 C.F.R. § 1614.105(a)(1) or Title VII that Congress or the EEOC meant to import any common-law regime into the particularized administrative exhaustion process for federal employees. In any event, in the majority of the cases Green cites, the state courts did not consider whether the limitations period could run from the time of the employer's last discriminatory act. In each of

those cases, the claim would have been untimely even if the period did not begin to run until the employee gave notice of resignation. The courts considered only whether the limitations period could run from the later effective date of resignation. *See* U.S. Br. 20-23 & n.10.[12] Of the cases Green cites that did consider the issue presented here, two agreed that "in the context of a constructive discharge it is the *employer's* wrongful act that starts the period of limitations"—"not the *employee's* response." *Joliet* v. *Pitoniak*, 715 N.W.2d 60, 68 (Mich. 2006); *see also Harmon* v. *Higgins*, 426 S.E.2d 344, 347 (W. Va. 1992) (statute of limitations "begins to run on the date of the last offensive contact, or threat of offensive contact, which precipitated the termination of employment"). A third case considered and rejected a last-discriminatory-act rule, but only because the cause of action at issue called for a different rule. *See Mullins* v. *Rockwell Int'l Corp.*, 936 P.2d 1246, 1252 (Cal. 1997). Addressing a breach-of-contract claim, the court there explained that discriminatory acts predating the employee's resignation constituted only an anticipatory

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[12] *See Jeffery* v. *City of Nashua*, 48 A.3d 931, 934 (N.H. 2012) (plaintiff argued for effective-date-of-resignation rule rather than date-of-notice rule); *Patterson* v. *State Dep't of Health & Welfare*, 256 P.3d 718, 725 (Idaho 2011) ("[T]his Court must determine whether [plaintiff's] claim for constructive discharge arose with her resignation notice on March 16, or with the effective date of her termination on March 30."); *Whye* v. *City Council for City of Topeka*, 102 P.3d 384, 385 (Kan. 2004) (considering as possible accrual dates "(1) the date the employee notifies the employer of his or her intention to retire; (2) the date the employer accepts the employee's offer to retire; and (3) the effective date of the retirement"); *Stupek* v. *Wyle Labs. Corp.*, 963 P.2d 678, 680-681 (Or. 1998) (considering effective date of resignation and date employee gave notice of resignation); *Hancock* v. *Bureau of Nat'l Affairs, Inc.*, 645 A.2d 588, 590 (D.C. 1994) (similar); *Douchette* v. *Bethel Sch. Dist. No. 403*, 818 P.2d 1362, 1367 (Wash. 1991) (similar).

breach; the employee could elect to wait until an actual breach occurred to bring suit, and "the statute of limitations did not begin to run until he made that election by resigning." *Id.* at 1250. The court distinguished the federal antidiscrimination context, explaining that it "involve[d] a statutory scheme defining the act of discrimination as a wrong" that triggered the limitations period. *Id.* at 1252.[13]

Finally, contrary to Green's assertion (at 18-20), the traditional distinction between statutes of limitations and statutes of repose does not affect the analysis in this case. As explained above, this Court has repeatedly recognized that a statute of limitations can commence at a time other than accrual without losing its character as a limitations period. *See supra* pp. 30-33; *Heimeshoff*, 134 S. Ct. at 615 (contractual provision established a period of "limitations" subject to waiver, estoppel, and equitable tolling that began to run before cause of action accrued); *Dodd*, 545 U.S. at 359 (construing a "statute of limitations"); *Pillsbury*, 342 U.S. at 200 (same); *McMahon*, 342 U.S. at 27 (same). As in those cases, faithfully applying the text of 29 C.F.R. § 1614.105(a)(1) does not convert the limitations period into one of repose. Moreover, whereas a statute of repose can begin to run even before any injury has occurred, *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175, 2182-2183 (2014), tying the filing period in 29 C.F.R. § 1614.105(a)(1) to the date of the employer's last discriminatory act does not produce that result. In a con-

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[13] The constructive-eviction doctrine similarly sheds no light on the distinct federal limitations provision at issue here, and the sole case Green cites (at 23) considered only a D.C. statute of limitations running from the "accru[al]" of the cause of action. *National Railroad Passenger Corp.* v. *Notter*, 677 F. Supp. 1, 4 (D.D.C. 1987) (applying D.C. Code § 12-301).

structive discharge, an employee suffers injury and has a complete and present cause of action for discrimination under Title VII as soon as the employer commits the predicate unlawful discriminatory practice; the employee's later resignation changes only the damages recoverable for that violation. *Supra* pp. 17-21. Applying the last-discriminatory-act rule accords with the principle that limitations periods can begin to run when the wrongful act first results in damages, "'even though the full extent of the injury is not then known or predictable.'" *Wallace* v. *Kato*, 549 U.S. 384, 391 (2007) (quoting 1 Corman, *Limitation of Actions* § 7.4.1).

III. Title VII Policies Of Conciliation, Administrability, And Fairness Favor The Last-Discriminatory-Act Rule

Green contends that a date-of-resignation rule would "further[] Title VII's goals of administrability, fairness, and conciliation." Pet. Br. 27 (capitalization altered). In fact, the regulatory scheme's goal of facilitating early, informal resolution of employment disputes in the federal sector before "positions on both sides have ... hardened," 57 Fed. Reg. 12,634, 12,635 (Apr. 10, 1992), is met only by the last-discriminatory-act rule, which requires prompt initiation of the pre-complaint counseling process. And Green's arguments about fairness and administrability are both misplaced and overstated. These concerns—which were also advanced and rejected by this Court in *Ricks*—cannot trump the regulatory scheme. Nor are they necessarily addressed by Green's rule, as this case demonstrates.

A. The Last-Discriminatory-Act Rule Promotes The Purpose Of Pre-Complaint Counseling

"Voluntary compliance with Title VII," through "cooperation and conciliation," "is an important public policy." *W.R. Grace & Co.* v. *Local Union 759*, 461 U.S. 757, 770 (1983); *see Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1651 (2015). To that end, 29 C.F.R. § 1614.105(a)(1) requires prompt initiation of counseling to encourage "informal resolution ... , freely arrived at by all parties involved"—the recognized "best outcome" for the federal antidiscrimination regime. EEOC, *Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614*, at 2-14 (rev. Aug. 5, 2015) ("EEO-MD-110"). The short 45-day deadline reflects the EEOC's considered judgment that, in the federal sector, "the earliest possible contact with a counselor aids resolution of disputes because positions on both sides have not yet hardened." 57 Fed. Reg. at 12,635; *supra* pp. 4-5.

The last-discriminatory-act rule promotes that objective by requiring that an employee consult a counselor about the underlying discrimination—*i.e.*, the discrimination that, if left unaddressed, might precipitate the employee's resignation—at a time when informal resolution may still be possible. If counseling is successful, then no administrative complaint will be filed, the employee will remain employed, and no constructive-discharge issue arises. That is precisely the goal of pre-complaint counseling for federal-sector employees.

Green and the government would defer the employee's deadline for initiating counseling until the employee has resigned—a resignation that in many cases might have been avoided had counseling been sought earlier. That approach contravenes the goals of the

regulatory regime. As courts have recognized, "society and the policies underlying Title VII will be best served if, wherever possible, unlawful discrimination is attacked within the context of existing employment relationships." *Bourque* v. *Powell Elec. Mfg. Co.*, 617 F.2d 61, 66 (5th Cir. 1980); *see also Duncan* v. *General Motors Corp.*, 300 F.3d 928, 936 (8th Cir. 2002) (same); *EEOC* v. *L.B. Foster Co.*, 123 F.3d 746, 755 (3d Cir. 1997) (same); Pet. App. 21a. By the time the employee has resigned, the positions of the now-former employee and agency accused of discrimination will have hardened; pre-complaint counseling is at that point much less likely to resolve the conflict.

Green's amici make that point plain. *See* NAACP Br. 13-14. Amici contend that a date-of-resignation rule gives employees time to weigh the "enormous" "stakes involved in a decision to resign ... for the personal life, economic livelihood, and professional trajectory of the employee." *Id.* But delaying informal counseling until the employee has already weighed those considerations and committed to resign would make conciliation all but impossible.

Conflating the private-sector requirement to file a EEOC charge with the federal-sector requirement to initiate pre-complaint counseling—and invoking an argument this Court rejected in *Ricks*, 449 U.S. at 259 n.11—Green asserts (at 35-36) that "filing a complaint while on the job may strain relationships with an employer" and undermine efforts to "work things out." But pre-complaint counseling does not entail filing a complaint. Its aim is to forestall the filing of a complaint by attempting to "work things out" in the manner the EEOC has deemed most conducive to that end. And EEOC data confirm that, far from producing any

"strain" on employment relationships, pre-complaint counseling is often effective on that front.[14]

Green also says (at 35) that the last-discriminatory-act rule would "encourage employees to quit soon after perceived discriminatory acts to avoid a time bar." But the last-discriminatory-act rule does not require quitting; it requires that an employee consult a counselor. *See supra* pp. 4-5, 39. If counseling fails to yield a resolution, the employee need not immediately quit and bring a constructive-discharge claim. Rather, the employee can file an administrative complaint based on the underlying discrimination and, should he later resign, amend his complaint to include a related constructive-discharge claim. *See* EEO-MD-110, at 5-10 to 5-13; *supra* p. 7.

Green and the government question whether an amendment could "solve the problem," Pet. Br. 34; *see also* U.S. Br. 30, but the EEOC has long endorsed this procedure in the precise context of constructive discharge. An example from the EEOC management directive illustrates the point:

> An agency employee files a complaint of discrimination when his request for a hardship transfer is denied. During the investigation into his complaint, the complainant sends a letter

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[14] In 2012, "[p]re-complaint EEO counseling ... addressed many employee concerns before they resulted in formal EEO complaints. Of the 34,521 instances of counseling ... , 54.2% did not result in a formal complaint, due either to settlement by the parties or withdrawal from the EEO process." EEOC, *Annual Report on the Federal Work Force Part I: Fiscal Year 2012*, at iii, *available at* http://www.eeoc.gov/federal/reports/fsp2012/upload/FY-2012-Annual-Report-Part-I-Complete.pdf (last visited Sept. 28, 2015).

> to the EEO office stating that he has decided to resign from the agency because of the agency's failure to transfer him and the resulting stress. He further states that he is no longer seeking the transfer as a remedy to his complaint, but asserts he is entitled to a compensatory damages award instead. The EEO office should amend the original complaint to include the complainant's new like or related claim of constructive discharge.

EEO-MD-110, at 5-13; *accord* EEOC, *Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614*, at 5-12 (as revised, Nov. 9, 1999).[15] Green and the government also note a comment by the EEOC that "[t]he fact that you filed an earlier charge may not extend the deadline." EEOC, *After You Have Filed a Charge*, *available at* http://www.eeoc.gov/employees/afterfiling.cfm (last visited Sept. 28, 2015). That general statement is surely true, since an amendment must relate to the issue previously raised. *See* 29 C.F.R. §§ 1601.12(b), 1614.106(d). In a constructive-discharge case, however, the underlying discrimination will necessarily be "like or related to" the resignation for purposes of the amendment procedure. *See, e.g.*, Pet. Br. i (addressing "discriminatory act giving rise to the resignation"); *see also* EEO-MD-110, at 5-13; *supra* n.3.[16]

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[15] This procedure thus does not invite any "multipl[ying]" of claims, as employees need only amend the original complaint. *Cf.* U.S. Br. 30.

[16] Citing *Hebert* v. *Mohawk Rubber Co.*, 872 F.2d 1104 (1st Cir. 1989), and *Young* v. *National Center for Health Services Research*, 828 F.2d 235 (4th Cir. 1987), Green says (at 33-34) that constructive discharge "does not require" an independently actionable underlying act of discrimination, and that "some constructively

B. Green's Concerns For Administrability And Fairness Lack Merit

Green contends that the "date-of-resignation rule is the 'simple approach,' which is easy to understand and apply." Pet. Br. 28 (citation omitted); *see also* NAACP Br. 17. Green's dispute with the government over how to apply that rule to the facts of this case belies that assertion. *Compare* U.S. Br. 32-34 (Green resigned when he signed the settlement agreement), *with* Pet. Br. 7-8 (Green resigned when he signed his resignation papers). As their disagreement shows, adjudicators must review "disputed timelines" to determine "whether, and exactly when, particular acts took place" under the date-of-resignation rule no differently than under the last-discriminatory-act rule. Pet. Br. 28. Indeed, such determinations are the bread and butter of all statute-of-limitations cases. *E.g.*, *Wallace* v. *Donley*, 2010 WL 3314272, at *4 (Office of Fed. Ops. Aug. 12, 2010) (rejecting employee's "dispute[]" regarding "dates" and finding hostile-work-environment claim barred where the record revealed that the employee failed to timely initiate counseling).[17]

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discharged employees" will therefore "have no earlier complaints to amend." Green's premise is incorrect. A "constructive discharge claim cannot exist independently of a discrimination claim." Shuck, 23 Berkeley J. Emp. & Lab. Law at 416; *supra* p. 19. And in both *Hebert* and *Young*, the plaintiffs could have filed earlier complaints on underlying acts of discrimination. *See Hebert*, 872 F.2d at 1113 (underlying discrimination was choice between early retirement or discharge); *Young*, 828 F.2d at 237-238 (underlying discrimination was "[c]ontinual harassment").

[17] Green cites (at 28) *Barone* v. *United Airlines, Inc.*, 355 F. App'x 169 (10th Cir. 2009), but *Barone* had nothing to do with timeliness, and no relevant dates were in question.

The constructive-discharge context adds no unusual complexity to the application of the last-discriminatory-act rule. Green contends (at 12, 29-31) that courts would struggle under that rule with "issues of substantive antidiscrimination law" to decide whether an employer's alleged conduct was "sufficiently 'discriminatory' to trigger the limitations period." That misapprehends the inquiry under the limitations provision. A court assessing timeliness need not decide on the merits whether the employer's alleged conduct was unlawful; it need only determine when the employee says the "matter *alleged to be* discriminatory" occurred. 29 C.F.R. § 1614.105(a)(1) (emphasis added).

That inquiry in turn is precisely the same inquiry that courts make to determine the timeliness of a federal employee's EEO contact in any other kind of discrimination case. As the cases Green cites (at 31) acknowledge, it is "settled that the applicable administrative deadlines run from the time of the discriminatory act." *Young* v. *National Ctr. for Health Servs. Research*, 828 F.2d 235, 237 (4th Cir. 1987). For example, Green highlights constructive-discharge claims "emerg[ing] from an allegedly hostile work environment," emphasizing the complications of assessing "when a hostile work environment existed," and whether certain conduct constitutes a "'last act.'" Pet. Br. 29, 30; *see also* NAACP Br. 21. But those are the same determinations courts must make to assess the timeliness of a hostile-work-environment claim that does *not* involve a constructive discharge. *See, e.g.*, *Sturdivant* v. *City of Atl.*, 596 F. App'x 825, 828 (11th Cir. 2015) (per curiam) (because "the last acts that could arguably be said to have contributed to the alleged hostile work environment," *i.e.*, "laughing and smirking," occurred more than 180 days from the filing

of administrative complaint, claim was time-barred). The same is true for retaliation claims. *See, e.g., Wilks* v. *Elizabeth Arden, Inc.*, 507 F. Supp. 2d 179, 192 (D. Conn. 2007) (plaintiff barred from asserting any "acts of ... retaliation under Title VII" occurring outside the limitations period); *see also, e.g., Bass* v. *Joliet Pub. Sch. Dist. No. 86*, 746 F.3d 835, 840 (7th Cir. 2014) (claim of sex discrimination untimely where "discriminatory actions" took place "outside the 300-day window"); *cf.* Pet. Br. 30.

Green's predictions that the last-discriminatory-act rule will unfairly trap unwary lay litigants—an argument the Court rejected in *Ricks*, 449 U.S. at 259-260—are equally overblown. As an initial matter, Green overstates (at 27) the volume of cases the last-discriminatory-act rule will affect. As the government notes (at 31 n.12), constructive-discharge claims "accounted for only a small fraction" of Title VII charges before the EEOC in 2014. And, as discussed, in many constructive-discharge cases, the time of the employee's resignation will coincide with or follow closely behind the time of the employer's last discriminatory act, *supra* pp. 20-21, making the choice of rule inconsequential. Where that is not so, however, a diligent claimant can and should pursue EEO counseling on the underlying act of discrimination and, if necessary, amend the administrative complaint later if the alleged discrimination leads to resignation. *Supra* pp. 40-41.

Green—who was represented by counsel when he pursued his constructive-discharge claim in the EEO process, *supra* p. 11—posits (at 33) that an unrepresented lay employee might not know about the applicable time limits or how they work. But § 1614.105(a)(2) contains a "feature uncommon to statutes of limitations" that "absolve[s]" an employee "from complying

with the filing period" where the employee was not "aware" of the time limits, where the employee did not know and reasonably should not have known that the discriminatory matter occurred, or for any other reason considered sufficient by the agency or EEOC. *Pauling* v. *Secretary, Dep't of Interior*, 160 F.3d 133, 136 (2d Cir. 1998); *see supra* p. 6. Green also speculates (at 37) that the last-discriminatory-act rule would allow an employer to "insulat[e] itself from a constructive discharge claim" by "lull[ing] unwary employees into letting their claims lapse." This argument again ignores the text of the regulation, which recognizes the applicability of equitable rules designed to protect claimants from precisely such mischief. 29 C.F.R. § 1614.604(c) (45-day deadline is "subject to waiver, estoppel and equitable tolling"); *see also, e.g.*, *Heimeshoff*, 134 S. Ct. at 615 ("courts are well equipped to apply traditional doctrines," including equitable tolling, waiver, or estoppel, when defendant's conduct or other circumstances prevent the plaintiff from filing claim); *Irwin*, 498 U.S. at 96 (equitable tolling available where "the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass"); *Cochran* v. *Reno*, 1996 WL 705504, at *2 (Office of Fed. Ops. Nov. 27, 1996) (allowing claim to proceed despite two-year delay to determine "whether appellant was misled"). Green thus cites no evidence of "unwary" claimants who have been trapped unfairly by the limitations provision in those circuits that have adopted the last-discriminatory-act rule.

It is true that the federal-sector exhaustion requirements and time limitations are "rigorous." *Brown*, 425 U.S. at 833. That is by design. The EEOC sought to promote "the earliest possible contact with a counselor" to "aid[] resolution of disputes." 57 Fed. Reg. at

12,635; *cf. Morgan*, 536 U.S. at 109 ("'[B]y choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination.'"). Those short time limits "also protect employers from the burden of defending claims arising from employment decisions that are long past." *Ricks*, 449 U.S. at 256-257. As the court of appeals explained below, the date-of-resignation rule contravenes that "essential feature of limitations periods by allowing the employee to extend the date of accrual." Pet. App. 20a-21a. This Court should similarly reject a construction of 29 C.F.R. § 1614.105(a)(1) that would "giv[e] claimants an option"—as the date-of-resignation rule does—"as to when they will choose to start the period of limitation." *McMahon*, 342 U.S. at 27; *see also Pillsbury*, 342 U.S. at 200. Rather, "'strict adherence to the procedural requirements specified" by regulation "is the best guarantee of evenhanded administration of the law.'" *Morgan*, 536 U.S. at 108.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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